**Orba Transshipment of Alabama, A Division of Orba Corporation *and* Randall D. Brown.** Case 10-CA-17928

31 May 1983

## DECISION AND ORDER

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On 3 January 1983 Administrative Law Judge William N. Cates issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge and to adopt his recommended Order.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

[1] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We find it unnecessary to rely on the Administrative Law Judge's discussion of *Roadway Express, Inc.*, 246 NLRB 174 (1979), in sec. E of his Decision, since we agree with his finding that Brown's return to work on probation was not alleged to be unlawful. We also find it unnecessary to rely on his finding regarding Brown's alleged strike misconduct or on his dicta regarding Respondent's authority to impose discipline less than discharge.

We also note that the Administrative Law Judge inadvertently miscited *Wright Line, a Division of Wright Line, Inc.*. The correct citation is 251 NLRB 1083 (1980).

## DECISION

### STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge: This case was heard in Muscle Shoals, Alabama, on September 8 and 9, 1982. The charge herein was filed on February 26, 1982, by Randall D. Brown, an individual, hereinafter Brown, and the complaint based on the charge issued on April 16, 1982, alleging that Orba Transshipment of Alabama, A Division of Orba Corporation, hereinafter Respondent, violated Section 8(a)(3) and (1) of the National Labor Relations Act, as amended, hereinafter the Act, by on or about January 26, 1982, issuing a 7-day disciplinary suspension, and on or about February 11, 1982, indefinitely suspending, and on or about February 17, 1982, discharging, and thereafter failing and refusing to reinstate Brown, because of his membership in, and activities on behalf of the Union, and because he engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection. Respondent by its timely answer denies having violated the Act in any manner.

Upon the entire record,[1] including my observation of the demeanor of the witnesses and after due consideration of briefs filed by counsel for the General Counsel and counsel for Respondent, I make the following:

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a New Jersey corporation with an office and place of business located in Pride, Alabama, where it is engaged in the operation of a coal handling facility. During the year preceding issuance of the complaint herein, Respondent sold and shipped from its Pride, Alabama, facility products valued in excess of $50,000 directly to customers located outside the State of Alabama. The complaint alleges, Respondent admits, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, Respondent admits, and I find that International Union of Operating Engineers, Local 320, herein Union, is and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Undisputed Facts and Background*

Respondent at its Pride, Alabama, facility off loads coal from river barges along the Tennessee River. The coal is off loaded from the barges, blended, and reloaded on railcars for further shipment to customers of Respondent.

The Union was certified in Case 10-RC-11416 as the collective-bargaining representative of certain of Respondent's employees at its Pride, Alabama, facility. The parties stipulated that there has been a collective-bargaining agreement between Respondent and the Union at all

[1] The complaint in the instant case was consolidated with Orba Transshipment of Alabama, A Division of Orba Corporation, and International Union of Operating Engineers, Local 320, Case 10-CA-17660. Case 10-CA-17660 named three individuals, Jamie Hunt, Edward Nipper, and Kenneth Webb as having been discharged by Respondent herein in violation of Sec. 8(a)(3) and (1) of the Act. The parties arrived at a settlement of Case 10-CA-17660 after the hearing herein opened, which settlement resolved all the matters contained in Case 10-CA-17660. Thereafter, the General Counsel moved to have the cases severed and to dismiss the complaint in Case 10-CA-17660. I granted the General Counsel's unopposed motion to sever the cases, and I dismissed the complaint in Case 10-CA-17660.

times since September 1978. The parties stipulated that negotiations toward a second contract between Respondent and the Union commenced on July 14, 1981, and continued until September 1, 1981. The parties likewise stipulated that on or about September 1, 1981, the Union commenced an economic strike at Respondent's Pride, Alabama, facility. It is undisputed that the parties executed a collective-bargaining agreement on November 11, 1981. The parties stipulated that on November 11, 1981, the Union made an unconditional offer on behalf of the unit employees to return to work. The parties stipulated that on or about November 13, 1981, the employees who had engaged in the economic strike against Respondent returned to work with the exception of certain employees who had been discharged by Respondent for alleged strike misconduct.

It is likewise undisputed that Respondent sought and obtained a preliminary injunction against the Union in the Colbert County Circuit Court of the State of Alabama. The preliminary injunction was binding on the Union as well as Business Manager Hiram Ezell. The preliminary injunction also specifically named Don Tays, Howard Craig, Robert McKissack, Michael Fuller, Phillip Thorn, Randy Brown,[2] Mike Wilson, Joe Pounders, Robert Willis, and the other members of the Union who were employed by Respondent on September 1, 1981, and who were engaged in the strike at Respondent's Pride, Alabama, facility. The order was signed by Acting Circuit Judge George E. Carpenter and was dated October 23, 1981 (Resp. Exh. 5).

It is undisputed on this record that Randy Brown, Joe Pounders, Phillip Thorn, Mike Wilson, and Robert Willis were job stewards for the Union at Respondent's facility prior to the September 1, 1981, strike and were also members of the Union's contract negotiating team.

At some point subsequent to the commencement of the strike and prior to November 13, 1981, Respondent and the Union negotiated an agreement with respect to approximately 20 employees that Respondent contended had engaged in strike misconduct sufficient to warrant their termination. Respondent and the Union, as part of their negotiations, agreed that 10 of the employees alleged to have committed strike misconduct would return to work on November 13 but would be on probationary status for 1 year. Brown, the Charging Party herein, was one of the 10 individuals returned subject to 1 year's probation.[3]

[2] Randall Brown, Randy Brown, and Brown all refer to the Charging Party herein.

[3] The other nine employees were Craig, Wright, Thorn, Gibson, Holden, McKissack, Ray, Renfroe, and Turberville. Two of the 10 that returned were union stewards. In addition to Brown, Union Steward Thorn was returned on 1 year's probation; however, upon their return they were not able to function as stewards because of their probationary status. It is also undisputed that certain of the remaining 20 employees who had been discharged for alleged strike misconduct had their discharge submitted to final and binding arbitration. The parties made a submission agreement to the arbitrator in which it was agreed that, if the arbitrator returned any of the employees to work, they would receive no backpay and would be placed on probationary status for 1 year. Union Steward Joe Pounders was returned to work by the arbitrator with the conditions outlined in the submission agreement. It is likewise undisputed that the two remaining jobs stewards, namely, Michael Wilson and Robert Willis (who were also on the Union's negotiating committee), were not accused of any misconduct by Respondent during the strike. It is undisputed that Wilson continues to function as a union steward. None of the 10 employees, other than Brown, that returned to work on probation has been terminated for disciplinary reasons.

B. *Sequence of Events Relating to Brown*

The complaint at paragraph 6 alleges that Brown was issued a 7-day disciplinary suspension on January 26, 1982. The complaint at paragraph 11 alleges that Brown on or about Feburary 11, 1982, was indefinitely suspended by Respondent, and paragraph 8 of the complaint alleges that on February 17, 1982, Brown was discharged and Respondent thereafter failed and refused to reinstate him because of his membership in, and activities on behalf of, the Union and because he engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection.

1. Employment history of Brown

Brown commenced work for Respondent in July 1977 and worked as an operator until his termination on February 11, 1982. Brown testified he was one of those who helped the Union in its initial organizing efforts at Respondent. Brown served as a job steward in 1980 and 1981 and was on the negotiating committee for the Union during negotiations for the second contract between Respondent and the Union. As a job steward, Brown filed various grievances on behalf of several employees. Brown testified that no one from management ever complained to him about his having filed grievances on behalf of fellow employees. Brown testified with respect to his being a member of the negotiating committee for the Union that his name specifically came up once in negotiations because he had informed the local news media, both television and newspaper, regarding the status of the contract negotiations. Brown testified that Respondent's chief negotiator, Lee, brought the matter up at a negotiating session after the media had been informed about the status of negotiations. Brown testified he was absolutely unaware that the negotiations were to be confidential. However, he stated the Union's chief negotiator, Ezell, spoke with him regarding his having spoken to the media about the status of negotiations. Ezell spoke with Brown before Lee complained at a bargaining session that there had been news leaks. Ezell told Brown he did not think the media would be helpful to either side in the negotiations.

Brown admitted that prior to the September 1, 1981, commencement of the strike at Respondent that he (Brown) had been warned more than once about his general work performance by supervisors of Respondent. Although his memory with respect to any prior warnings was extremely vague, Brown remembered getting a letter of reprimand sometime subsequent to his employment and prior to the strike. Brown testified, "I had been warned before . . . I remember having some warnings about—well, I remember being warned or written up." Brown also testified, "I remember being counseled on one occasion while I was employed by Orba. I don't remember—I do remember that I was given a sheet of paper that had all kind of occasions on it, and some of the occasions I never even remembered happening."

Brown testified he attended the state court injunction hearing in Colbert County, Alabama. Brown testified that Vice President of Operations Prosec testified in the state court proceeding that one of his supervisors had informed him that Brown was going to try to get inside Respondent's plant and cut up conveyor belts. Brown testified he never had any intention of cutting any of Respondent's conveyor belts.

Vice President of Operations Prosec testified that he did not state during testimony at the state court injunction hearing that Randall Brown had attempted or was part of an attempt to cut conveyor belts at Respondent's premises during the strike. Prosec testified that he stated in the state court injunction hearing that he had a conversation with one of his supervisory employees, and in the course of that conversation the supervisor made reference to the fact that his (the supervisor's) wife had a conversation with Randall Brown's mother and in that conversation there had been some allegations to the effect that some of the employees had a plot to break into the terminal and cut conveyor belts of Respondent. A verbatim transcript of the testimony in question supports Prosec's testimony.[4]

Walter Lee testified that he was the vice president of personnel and labor relations for the Litton Companies, and in that capacity he was responsible for labor relations for the Orba Corporation Alabama Division and that, in that regard, he acted as chief spokesperson for Respondent in their negotiations which took place in 1981 for a collective-bargaining agreement with the Union. Lee testified that at the very first negotiating session Respondent proposed, and the Union agreed, that details of the negotiations would not be discussed outside of the negotiating committee members' presence until such time as the Union returned to the membership to give a full report on the status of negotiations. Lee testified that based on that understanding Respondent took the position that it would not even communicate the details of the negotiations to its supervisory personnel. Lee testified that the Union's entire negotiating team, specifically including Brown, was present when this understanding was negotiated. Lee testified that during August, at a time when the economic proposals of the parties had been exchanged, he noticed an article in a local newspaper that discussed the last economic proposal submitted by Respondent. The newspaper indicated Brown was the source of its quotes: Lee testified he called the Union's chief spokesperson, Ezell, and told him about the newspaper article. Ezell told him that he was aware of it and had already spoken to Brown about it. Lee reminded Ezell of their agreement not to discuss the negotiations outside of the committee, and Ezell indicated he understood that and had talked to Brown. Lee testified he told Ezell that he intended to bring up the subject at the next negotiating session for the purpose of reminding the total committee of that agreement and to find out if there existed any reason why the parties should deviate from their agreement in the future. Lee testified that he brought the subject matter up at the following negotiating session but he did not belabor the point. Lee testified he did not mention Brown's name thereafter in connection with any leaking of information to the news media.

[4] I admitted the testimony with respect to what was testified to at the state court proceeding not for the truth of the matter contained therein, but with respect to any assistance it might provide with respect to credibility resolution in the instant case.

2. The alleged offense for which Brown was initially denied reinstatement following the strike

Brown testified he learned he had been discharged in November 1981 when Respondent provided to the Union a list of employees (approximately 20) that it was going to terminate allegedly for strike misconduct. Brown testified that he along with each member of the Union's negotiating committee was provided a copy of the list. Brown asked Respondent's chief negotiator Lee, why his name was on the list. Lee told Brown that he (Lee) had been informed that Brown had followed someone from the plant. Brown testified he had not followed anyone from the plant during the strike. Brown stated he was not present at the negotiating session at which it was agreed that he, along with certain other of the employees who had been accused of strike misconduct, be returned to work with one year's probation. Brown testified he received word that he had been placed on a year's probation from fellow employee Joel Wright. Brown testified he returned to work along with all the other returning strikers on November 13, 1981.

Brown testified he had a conversation with his supervisor, Thompson, shortly after he returned to work involving a rule infraction (being on a tugboat), and during that conversation he told Thompson he had been placed on a year's probation for something he had not done. Brown testified Thompson told him that he (Brown) had followed someone from the plant, and that he knew it was Brown because he had been stopped, and that it had been verified that it was he by the Colbert County Alabama Police.

Brown testified that following his return to work on probation and his learning that the probation was for something he had not done, he did not attempt to file a grievance on the matter because he was a probationary employee. Brown testified that he did not ask Union Representative Ezell to investigate the matter or to call a meeting with Respondent in an attempt to get it resolved. Brown stated he did not do so because it would have been useless. Brown testified he did not go to the National Labor Relations Board at that time to file any charges that he had been placed on probation because of any protected concerted conduct on his part. Brown stated that he did contact a labor law teacher at the University of Alabama in Birmingham about his situation.

Union Business Manager Ezell testified, in response to questions by counsel for the General Counsel, with respect to the negotiations which took place between Respondent and the Union concerning the return of the 10 individuals to employment subject to a year's probation, that Brown was a part of the committee that negotiated the agreement; but he did not recall if Brown was present when the final particular agreement was arrived at. Ezell, when further questioned about the matter, testified as follows:

Q. (Judge Cates) Mr. Ezell, with respect to the sessions that the Union and the Company engaged in at or about the time of the conclusion of the strike when the employees unconditionally offered to return to work, did you attend those meetings that resulted in the return of the ten to work that the company had contended were engaging in misconduct?

A. (Ezell) Yes I did.

Q. Who all was present on behalf of the Union?

A. Your Honor, the whole committee was there. There were occasions that we would caucaus [sic] with part of the committee. I don't remember if this was the case when we were working out these details or not. It could have been or it could not have been. It could have been that we all were present. I'm not sure.

Q. But you were present?

A. I was present.

Q. Was Mr. Brown present?

A. He was at the meetings, yes. Now, whether he was there all the time when we went into session, I cannot say.

Q. But he was part of the committee?

A. Yes. He was part of the negotiating committee.

Q. And had the privilege of being present. Whether he was present at all sessions or not, he had the privilege of being present?

A. Yes.

Union Steward Michael Wilson testified as a rebuttal witness that, when the parties negotiated the return of the employees with probation, it was only Ezell, Willis, and himself present for the Union.

Respondent's general superintendent, Bolton, testified that Respondent presented a list to the Union after the contract was signed on November 11, 1981, of employees that it contended had engaged in misconduct during the strike and for which Respondent was going to terminate them. Bolton testified that Respondent had previously provided the Union a list on October 28, 1981, and Brown's name was on the October list as one of those to be discharged for alleged strike misconduct.

Bolton testified that the misconduct involving Brown happened on either September 10, 11, or 12, 1981. Bolton testified Brown and a fellow employee (Joel Wright) followed five of Respondent's supervisory personnel when they left the plant around 1 p.m. on one of those dates. Bolton testified Brown followed Supervisors Hale, Thompson, Tuggle, Holland, and a fifth supervisor whose name he could not recall at the time. Bolton testified he was not aware of Brown making any physical assault on any of the supervisors or of blocking their egress or ingress, and, as far as he knew, there was no verbal abuse by Brown. Bolton testified he talked to the five supervisors in question, and they told him that Brown and Wright had followed them as they left Respondent's facility. Bolton testified he was concerned because the incident happened early in the strike, and it was the second or third incident after the strike where someone had left Respondent's facility and was followed. Bolton stated his concern caused him to call the Alabama State Troopers and the Colbert County Sheriff's Department. Bolton testified he notified the authorities telling them he was fearful that the individuals leaving Respondent's facility would be followed by the strikers. Bolton testified it was negotiated between the Union and Respondent that Brown along with certain other employees would be returned to work on probation because of the alleged strike misconduct the individuals had allegedly engaged in.

3. The early November 1981 tugboat incident

Brown testified that shortly after he returned to work in November 1981 that he (Brown) was coming off one of Respondent's tugboats when Supervisor Thompson asked him if he had not been warned about being on the tugboat. Brown told Thompson that he had been. Brown testified Thompson gave him a warning for being on the tugboat without permission. Brown testified he understood that employees needed permission from their foreman before they went on the tugboat. Brown stated he went on board the tugboat to use the tugboat's restroom facilities. However, Brown acknowledged that restroom facilities were amiable on land in the form of port-a-johns within some 60 to 70 yards.

Respondent's leadperson, Thompson, testified he supervised Brown for approximately 4 or 5 days in November when Brown returned to the day shift at the conclusion of the strike. Brown was working as a front-end loader at that time and had not been assigned as a crewmember on Respondent's tugboat. Thompson testified he proceeded to the river to check on things and found Brown coming off the tugboat. Thompson asked Brown why, and Brown told him he had gone on board to use the restroom. Thompson told Brown he did not have permission to be on the boat because one of the rules of Respondent was that no one went on the boat except the deckhands and the pilot. Thompson testified Brown told him that Respondent was going to fire him anyway and, if it was, to just go ahead and do it. Thompson testified he gave Brown a verbal warning for being on the tugboat without permission. Thompson learned from two other supervisors that they also had warned Brown within the same week about being on the tugboat without permission. Thompson stated the rule with respect to not being on the tugboat without permission was so that Respondent could keep track of its employees, and, also, any employee on a tugboat had to wear a lifejacket for safety reasons. Thompson testified Brown did not have on a lifejacket when he saw him coming off the tugboat. Thompson testified restroom facilities were available in the form of port-a-johns at the end of the C-1 catwalk for employees to use who were not allowed on the tugboat.

4. The January 18, 1982, incident

Brown testified on cross-examination that he could not remember being warned on January 18, 1982, about being out of his work area. However, after further questioning on cross-examination, Brown remembered leadman Thompson saying something to him, but he did not

recall that it was a warning. Brown stated that, on the day in question, he was pumping water out of the entrance to a tunnel to keep from having to wade through the water to perform his assigned task for that day of walking tunnels. Brown testified that the weather that day was cold and, while the water was being pumped out, he stood by a salamander.[5] Brown testified he did not spend more than 5 to 10 minutes at the surge bin where the salamander was located. The surge bin was away from the area where he was pumping the water so he could check the conveyor belts in the tunnel. Brown testified he remembered Thompson coming to him and asking him why he was not watching the tunnels but he did not recall Thompson giving him a verbal warning at that time.[6] Brown testified, "I could visibly see the pump pumping water and the stream that was coming out, after it had decreased, I remember going back over to the area and cutting the pump off and continuing walking belts." Brown testified Thompson had instructed him earlier that day to be a tunnel man and to keep his eye on the feeder belts and to walk the tunnels. Brown acknowledged at the time Thompson spoke with him he was not in the tunnel but was standing by the surge bin next to the salamander warming himself. Brown also acknowledged that the belts that run in the tunnels can get caught on the metal which causes the belt to hang up and, if it is not discovered early it can shut the operation down and shred the belt. Brown testified, "A constant watch over the different belts is necessary." Brown stated he had pumped water out of tunnels in the past and had never been warned.

Although Brown could not at first recall the conversation set forth above, he did testify that sometime in either late December 1981 or early January 1982 Thompson stated to him, while they were riding from one project to another, that his time was limited. Brown did not know how the comment came up. Brown stated he did not say anything to Thompson when Thompson told him this.

Leadman Thompson testified that on January 18, 1982, he had instructed Brown to walk two tunnels and to check the feeder belts in order to keep the belt tracked over and keep them out of the metal. Thompson stated that, if the feeder belts track over into the metal, they can rip and cause the coal to come down through the feeder belts causing the main belt to shut off and fill that part of the tunnel with coal. Thompson testified there was no way to inspect the belts down in the tunnels without going down and walking the tunnels and visibly checking to see how the belts are operating. Thompson testified he went to the area and found Brown at the surge bin some 50 to 75 yards from the tunnels he was supposed to be watching belts in. Thompson told Brown he could not watch the belts from the surge bin, to go back to the tunnels and observe them. Brown told Thompson that he had come over to the area of the salamander to warm. Thompson testified he did not remember Brown saying anything about having a pump running to pump water from the tunnels. Thompson testified he did not see or hear any pumps running. Thompson testified he gave Brown a verbal warning for being out of his work area to which Brown said nothing.

Thompson testified, as will be set forth elsewhere in this Decision, that he had stated on more than one occasion that Brown was not a good worker, and that, if Brown or anyone else who worked under him (Thompson) did not pull his fair share of the workload, he would not be around long at Respondent.

Thompson acknowledged on cross-examination that it was left to the discretion of the tunnelman to make sure that the tunnels were pumped out when they needed to be, and that failure to pump a tunnel could result in discipline. Thompson acknowledged that he did not use the specific words to Brown when he gave him his warning that "this is a verbal warning." Thompson could not recall ever at any time in January 1982 telling Brown that his time was limited.

5. The January 26, 1982, disciplinary suspension

The complaint at paraghraph 6, 9, and 10 alleges that Respondent on or about January 26, 1982, issued a 7-day disciplinary suspension to Brown because of his membership in, and activities on behalf of the Union and because he had engaged in concerted protected activity with other employees for the purpose of collective bargaining and other mutual aid and protection.

Brown testified he was assigned as a tunnelman on January 26, 1982. The job entailed walking tunnels, adjusting conveyor belts, and reporting any tears or damage to the belts. Brown testified that, on that particular morning, he was making his assigned trips through the tunnels when he was approached by leadman Thompson. Brown stated he had just finished adjusting a belt and was watching it run. Thompson told Brown to follow him. Brown picked up his feeder wrench and followed Thompson out of the tunnel. They went directly to the loadout and got into a truck. Brown testified he thought Thompson was taking him to some other part of the project to work so he laid down his feeder wrench when he got into the truck with Thompson. Brown asked Thompson where they were going. Thompson told Brown he was being suspended until further investigation. Brown inquired why, and Thompson told him it was because he was not doing his job. Brown told Thompson that he was doing his job. Brown asked to speak to his job steward; however, he testified his request was denied and at the same time Thompson told Brown to put his stuff up, get his personal belongings, and get the hell out.

Brown testified he filed a grievance on the suspension after he found out what he was suspended for. Brown testified he turned the grievance in to his job steward the first day after he returned to work. The grievance was denied, according to Brown, because it was untimely filed.

Brown testified he learned from his mother that there was to be a meeting concerning his discipline. Brown

[5] A salamander was described as a piece of equipment utilized to keep employees warm during cold weather.

[6] Although Brown could not at first recall the conversation until pressed further by Respondent on cross-examination, he later on redirect examination by the General Counsel indicated the date in question of the conversation was January 18, 1982.

testified those present at the meeting were Leadman Thompson, General Superintendent Bolton, Production Supervisor Dave Skuthern, Job Steward Mike Wilson, and himself. The meeting was held in Bolton's office. Brown testified that Thompson told him he had been warned in the past and had been given chance after chance and that a decision would be made as to what discipline would be taken involving him and that he would get a copy of the decision. Brown testified he was told that he had been out of his work area, and that was the basis for the discipline given him. Brown stated they told him he had been told to stay out of the loadout. Brown stated he had not been told to stay out of the loadout but rather had simply been told by leadman Thompson not to stay in the loadout for a long period of time. Brown testified it was normal for him to check in at the loadout for the purpose of reporting bad places in conveyor belts and for other purposes. Brown testified he was not in the loadout area on the day in question over 10 minutes in time. Brown testified that at the end of the meeting he was told that he would get a letter outlining the extent of the disciplinary action taken against him, whether he would be suspended or terminated. Brown testified he returned to work on February 3, 1982. Brown testified that he received a letter of notification with respect to his 7-day suspension on February 1, 1982.

Brown acknowledged on cross-examination that he had been assigned the task of walking both tunnels C-6 and C-8 on January 26, 1982, and he was not sure whether he had gone to the loadout cab before he started walking the tunnels that day or not. Brown stated that, after walking through the tunnels the second time he went to the loadout to report water coming off of a conveyor belt. Brown acknowledged that, while walking through tunnel C-6 the second time he met fellow employees Lawson and Overton. Brown testified he had a conversation with Lawson and Overton because he had stopped there to adjust a conveyor belt, and he stayed to watch it run. He estimated he was 20 to 30 minutes adjusting the conveyor belt and watching it operate. Brown acknowledged on cross-examination that Bolton told him in the meeting involving his suspension, and after he had filed his grievance, that he would be informed in writing whether he had been suspended or terminated. Brown acknowledged that it was discussed at that meeting how long he had stayed in the loadout cab area that morning. Brown stated Thompson contended he had stayed too long in the loadout cab. Brown also testified that at that meeting the fact that he had allegedly stayed too long in the loadout cab area was part of Respondent's reason for suspending him. Brown also testified on cross-examination as follows: "I don't remember precisely calling Mr. Thompson a liar."

Michael Wilson testified that he was a job steward at Respondent's facility and that he was familiar with the circumstances surrounding Brown's suspension on January 26, 1982. Wilson testified he attended a hearing around January 26, 1982, in General Superintendent Bolton's office regarding Brown's suspension. Wilson indicated the same persons were present at the meeting that Brown indicated were present. Wilson testified that Thompson stated at the hearing that Brown had been in the loadout cab area too long, and that he was not watching belts in the tunnels because he had observed him shooting the breeze with Tommy Overton and Danny Lawson and did not even have his feeder wrench with him. Wilson stated he told them he had been in the loadout area that morning and that Brown had come in and told the blend operator that there was water coming off one of the feeder belts. Wilson estimated that Brown was in the area for approximately 10 minutes.

Wilson testified that Brown filed a grievance on his January 26 suspension and that Skuthern stated that the grievance was late. Wilson testified that Brown was not entitled to use the grievance procedure.

Leadman Thompson stated that at the beginning of any work shift he prepared a list of those that were to work the train area and those that were to work the river area. Thompson would then go into the breakroom and assign the various employees to their jobs and transport them to their job locations. On January 26, 1982, Thompson assigned Brown the job of walking tunnels at the train end of Respondent's facility. Thompson testified that around 8 a.m. he observed Brown going into the loadout. He (Thompson) waited a few minutes, walked down, but did not say anything to Brown, and then left the area. Thompson stated he went back to his office, and Brown was still in the loadout. Thompson talked to his own immediate supervisor, Delbert Holland, and Holland told him to go and get Brown and bring him up to the office and talk to him. Thompson told Holland that he was going to give Brown a few more minutes to see if he would go back to his assigned job. Thompson stated that, after 17 minutes, he started to go down where Brown was and talk to him about being in the loadout for an excessive amount of time; however, he observed Brown leaving the loadout area at that time, so he did not go to the area. Thompson testified he saw Brown enter tunnel C-6. He waited a while thinking that Brown might come out the north end of the tunnel to go into tunnel C-8, however, Brown did not come out. Thompson testified he was busy doing other things and later went back to the loadout and asked the employees in the area if they had seen Brown. The employees told him they had not. Thompson stated he started looking for Brown in tunnel C-8. He got about halfway through tunnel C-8 when he saw employees McGuire and Tyser and asked them if they had seen Brown; they told him they had not. Thompson testified he then came out of the north end of tunnel C-8 and proceeded to the surge bin where some maintenance employees were working and asked them if they had seen Brown, and they told him they had not. Thompson testified he went from the surge bin to the loadout to see if Brown had been there. Brown had not been there. Thompson testified he again went to tunnel C-6 and about 50 to 60 feet in the tunnel he discovered Brown talking to cleanup employees Lawson and Overton. Thompson testified Brown should have had a feeder wrench with him but he did not see one. Thompson testified the only feeder wrench he had seen that morning was at the entrance to tunnel C-6. Thompson testified that when he got to Brown and saw

him talking to the two cleanup employees without a feeder wrench and because the conveyor belts were running and making so much noise, he told Brown to come with him. Thompson testified he could not talk to Brown in that area without "hollering." Thompson waited until they got inside the truck and started back to the shop before telling Brown he was suspending him for not doing his job and for not being in tunnel C-8 for over an hour. Thompson told Brown he was suspended pending further investigation.

Thompson testified it was necessary to constantly observe the belts in the various tunnels and that it could only be done by the person assigned as tunnel walker to walk the tunnels. Thompson testified when he told Brown he was being suspended that Brown "got mad and come just a hollering and a carrying on." Thompson testified he tried not to get angry, but that Brown called him a liar and, when he did, he told Brown "to get his stuff and get the hell out of here." Thompson testified he went to the main office after that and told Production Supervisor Skuthern that he (Skuthern) had best go and see that Brown got his stuff and got out of there because he did not want to get into it anymore with Brown because Brown had made him angry by calling him a liar.

Thompson testified that he attended a hearing on Brown's suspension. Thompson testified that Brown brought out at the hearing that he (Thompson) was out to get him because of his union activities and because he had participated in the strike. Thompson told Brown at the meeting that that was not so, that what he had done during the strike did not bother him. Thompson testified that the two verbal warnings he gave to Brown in November and January and his suspension on January 26 had nothing to do with the strike activity of Brown, nor did it have anything to do with the fact that Brown had been a job steward or had served on the negotiating committee. Thompson testified that, as a result of the hearing on Brown's conduct, Brown was given a 7-day suspension by General Superintendent Bolton. Thompson testified Brown returned to work after his suspension.

General Superintendent Bolton testified that Brown was given a 7-day disciplinary suspension on January 26, 1982, for job inefficiency and failure to follow orders. Bolton testified he prepared and sent to Brown a letter dated January 29, 1982, regarding his discipline. Bolton testified that the 7-day suspension began on January 26 and ended on February 3, 1982. Bolton testified he thought, based on Brown's prior warnings, that a 7-day suspension was warranted. The letter Bolton sent to Brown read in pertinent part as follows:

> On 11-17-1981, you were given a verbal warning for not following your foreman's orders, after being told to stay off the ORBA boat on several previous occasions.
>
> On 1-18-1982, you were given another warning for being out of your assigned work area, after your foreman telling you earlier that day to stay in your assigned work area.
>
> On 1-26-1982, you were suspended for job inefficiency, after your foreman observed you at the loadout for about 20 minutes. He had told you to stay out of the loadout and on your assigned job.
>
> A meeting was held in my office, with you, your union steward, and your foreman present on 1-28-1982 to investigate your misconduct which lead to your suspension.
>
> I have talked to you on other occasions about your unsatisfactory job performance.
>
> Therefore, after several warnings, your repeated failure to comply to your foreman's orders, which create job inefficiency on your part, I am giving you a (7) day suspension from your job without pay.
>
> You will report back to work at 7 a.m. on February 3, 1982.
>
> Any further acts of inefficiency, failure to comply with orders, or being out of your assigned work area, on your part, can result in your termination from your job with cause.
>
> I hope you will correct these problems, so no further disciplinary action is necessary. [G.C. Exh. 3.]

### 6. Brown's February 11, 1982, suspension and February 17, 1982, discharge

The complaint alleges in paragraphs 7, 8, 9, and 10 that Respondent on or about February 11, 1982, indefinitely suspended its employee Brown, and on or about February 17 discharged him, and thereafter failed and refused to reinstate him because of his membership in and activities on behalf of the Union, and because of his concerted protected activity with other employees for the purposes of collective bargaining and other mutual aid and protection.

Brown testified he returned to work from his suspension on February 3, and on February 11 he was again disciplined by Respondent. Brown testified his first job assignment on February 11 was to clean up the shop area. Brown testified that, after cleaning up the shop area, he was taken to the C-1 area by Thompson and Hale. After arriving at the C-1 area, Brown was told to get a rake, shovel, and pick and to follow Thompson and Hale up the C-1 incline. After they proceeded up the C-1 incline, they met employee Johnny Rieves. Brown testified he was instructed by Thompson to clean coal out from in between the belts. Brown explained there was a metal piece that went between the conveyor belts up the C-1 incline for a distance. Brown testified he was told to take the pick, shovel, and rake and to clean the coal off metal down on both sides of the incline. Brown testified Thompson told him he knew the coal was hard and frozen and that it would be hard to clear out, but for him and Rieves to do the best they could. Brown testified that, when they had almost completed cleaning down one side, he, along with fellow employees Rieves and Billy Gibson (who was also in the vicinity), took a lunch break. Brown testified that, after lunch, the three of them were approached by Hale and Thompson. Hale gave them a verbal warning for taking a 30-minute lunch

break.[7] Brown testified Thompson at that time told him he was doing a good job. Brown testified he and Rieves cleaned down one side of the conveyor belt. Brown stated there was an area on the other side of the impact rollers that he tried to clear but the coal was hard. Brown testified that, after trying to clean the coal off the platform for a while, he went back to the area where his fellow worker Rieves had gone. Brown testified Rieves had skipped up about halfway on the incline and had started cleaning up toward the finishing point. Brown testified he started from the point of the impact rollers and cleaned up toward the halfway point. Brown stated that, after cleaning up to the halfway point, he went back to the area beyond the impact rollers where the coal was frozen and found it had begun to thaw, so he started cleaning that area. According to Brown, they lacked a little bit being through on the upper end of what "we was put down there to do." Brown testified he told Rieves that the coal had begun to thaw and that Rieves later joined him in that area.[8]

According to Brown, Hale saw him in that area that afternoon around 2 o'clock. Brown testified that near the end of the shift their transportation came to take them back to the main area. When they arrived at the shop area, Hale told Brown to come with him to General Superintendent Bolton's office.

Brown testified he went to Bolton's office where a meeting was held. Those present at the meeting were Hale, Bolton, Job Steward Wilson, Brown, and later on Thompson. Brown testified Hale told Bolton at the meeting that Brown had worked out of his assigned work area that day. Hale told Bolton that Thompson had instructed Brown to work a particular assigned area that day. Brown told Bolton that he had not been informed of any work area, and he had worked steady all day. Brown stated that, if he had been told to work a particular area, he would not have gone out of it. Brown testified Hale at that point said "something to the effect" that, if he were Brown on a year's probation, he would listen. Bolton told Brown there would be an investigation, and he would receive a letter informing him of whether his discipline would be a suspension or termination. Bolton told Brown that he had been given warnings and chances in the past and that he would send him a letter to that effect.

Brown testified that he was notified of a meeting to be held at the plant on February 17, 1982. Brown attended the meeting. Those present were Union Business Agent Ezell, Job Steward Wilson, and Respondent Officials Prosec, Bolton, Skuthern, Thompson, and Hale. Brown testified his earlier suspension was discussed, and he was informed by Bolton at the conclusion of the meeting that he was terminated.

On cross-examination Brown stated that Thompson instructed him to pick out the coal that was frozen under the rollers on the C-1 incline from the top of the incline to the lower area at the bottom called the impact rollers. Brown acknowledged on cross-examination that Thompson had not told him to clean coal in the tail pulley section; however, he stated he could not remember Thompson specifically telling him not to work that area. Brown stated on cross-examination that Hale told Bolton that he (Brown) had been told to clean coal out from between the belts where the sheetmetal was down the incline to the impact rollers and stop there. Brown stated the tail pulley section was beyond the impact rollers, and he acknowledged he had been below the impact rollers on the tail pulley section working on the day in question.

Brown further testified on cross-examination that Union Business Representative Ezell told the truth when he testified that there was no contention made at the February 17, 1982, hearing by either Ezell or himself that his suspension on February 11 had anything to do with his strike negotiating or job steward activities.

Union Business Agent Ezell testified he met with officials of Respondent on February 17 to discuss the grievance that had been filed with respect to Brown's suspension. Ezell stated the Union had an opportunity to present Brown's side at the grievance meeting. Ezell stated that Regional Manager Prosec, General Superintendent Bolton, and Personnel Director Cobern were present at the meeting. Ezell did not recall what day or in what form Respondent's answer came but did recall it was unfavorable to the Union. Ezell testified that the Union did not attempt to take Brown's suspension or discharge to arbitration. Ezell stated it was his understanding that the grievance procedure would not have applied to Brown. Ezell testified it was the Union's position at the meeting with Respondent regarding Brown's suspension and discharge in February 1982 that the discipline against him was for a frivolous matter because Brown had been assigned to shovel coal, and it had been proven that he had shoveled coal but had simply shoveled it in the wrong place. Ezell testified the Union argued that Respondent had a weak case against Brown. Ezell testified that he did not recall any mention being made at the meeting of any prior strike misconduct on the part of Brown.

Ezell testified that the whole union negotiating committee was present when Respondent and the Union negotiated the return of the employees that had been accused of engaging in strike misconduct. Ezell stated there were times when the committee went into caucus with part of the committee, and he did not recall whether Brown was present at the caucus sessions or not, but that Brown was part of the negotiating committee and had the privilege of being present whether he was or not.

Job Steward Wilson testified that, in the meeting[9] on the suspension of Brown, Thompson and Hale took the position that they had given Brown the job of clearing an area from the end of the impact rollers to an area up the C-1 incline, and that they had observed him in the tail pulley section instead of the area they had instructed him to work in. Wilson stated Hale was not complaining

[7] Brown testified the employees had been permitted to take a lunch break with the exception of operations. If operations were ongoing, the employees had to take lunch whenever they got a chance, that is, he explained they had to "more or less . . . eat on the run."

[8] Brown testified the area was called the tail pulley section.

[9] Wilson stated the meeting took place on February 11, 1982. Those present, according to Wilson, were Bolton, Thompson, Hale, Brown, and himself.

about the work Brown had done, but that he had done it in the wrong area. Wilson testified that Brown stated at the meeting that, if he had heard the instructions to stop at the impact rollers, he would have done so because he had just come off disciplinary suspension and wanted to do just that. Wilson testified that at the meeting that Brown had been warned over and over again, that he had been suspended for being out of his work area, and that he was going to suspend him that day, February 11 until further investigation. Wilson testified it was mentioned at the meeting on February 11 that another employee, Billy Gibson, had been assigned to work the area at the end of the conveyor belt near the tail pulley section.

Wilson testified that the uppermost part of the impact rollers is about 50 feet away from the tail pulley section. Wilson testified that, starting at the impact rollers, there were sheets of metal underneath the conveyor belts up to about one-third of the way to the top of the incline, and that in the winter time frozen coal and water accumulated on the sides of the conveyor belts and on the sheets of metal decking, and it had to be cleared away.[10]

Wilson testified he attended a meeting on February 17, 1982, involving the discipline given to Brown and Joe Pounders.[11] Wilson testified that Union Business Manager Ezell, Bobby Willis, Earl Prosec, James Cobern, Larry Thompson, David Hale, and Brown were present at the meeting. Wilson stated that it again came up at this meeting that Brown and fellow employee Johnny Rieves had been given instructions to clean a particular area and that they had been told to stop at the impact rollers. Wilson stated Brown said he had heard Thompson say to clean in between the rollers where the decking started. Wilson testified that Ezell had been called into the hearing because of Brown and Pounders' alleged infractions of Respondent's rules.

Thompson testified he was the leadperson for Brown on February 11, 1982. Thompson assigned Brown the task of cleaning up around the shop at the beginning of that day. Supervisor Skuthern then came into the area and told Thompson that someone needed to get some ice off the C-1 conveyor belt, and he wanted Thompson to put someone on it right then.

Thompson testified that, since Brown had just finished cleaning up the shop area, he took him, along with fellow employee Johnny Rieves, to the C-1 area where he told them to get a pick, shovel, and rake and to remove the ice and coal from the sheet metal on the C-1 conveyor belt down to the impact rollers. Thompson testified he told the two of them that the area was frozen hard and that it would be difficult to get the ice off, but he wanted them to do the best they could because it had to be removed. Thompson testified he then walked to the top of the incline with the two employees and again repeated to them precisely what he wanted them to do. Thompson testified he then left the area until around 11:30 a.m.

Thompson testified he later saw Brown, Rieves, and a fellow employee Billy Gibson taking a lunch break and that Hale spoke to them about taking the break. Thompson testified he walked the area that afternoon and noticed that Brown had left the area where he told him to work and was working at the tail pulley section. Thompson observed Brown for approximately 20 minutes and noted that Brown was doing very little work at all. Thompson said Brown would throw a shovelful now and then, but most of the time he was talking. Thompson testified Brown was 50 to 60 feet from the nearest part of the area where he had instructed him to perform work. Thompson, after observing Brown, left and got his (Thompson's) immediate supervisor, Hale, to come down and see that Brown was not performing work in his assigned area. Thompson stated he did not want just his word that Brown was out of his assigned area; he wanted a fellow supervisor to witness it also. Thompson testified the two of them observed Brown for approximately 15 minutes just standing around. Thompson stated he did not talk to Brown at that time because "I had talked and warned Randy [Brown], I felt numerous times, and plenty, you know. I don't think you should have to keep talking and talking to a grown man."

Thompson testified Hale went to the area where Brown was, but by the time he arrived there Rieves had come to that area also. Rieves was asked why he had come to the area, and he told them that Brown and Gibson had called for him to come down there, that the coal was easier to shovel there. Brown stated to Thompson that he had gone there to shovel because the coal was softer than where he had been assigned to work. Thompson testified that, by the time he and Hale got to where Brown and the others were, it was getting close to quitting time, so they brought them back to the office area. Hale took Brown to General Superintendent Bolton's office and Thompson took Rieves to the foremen's office. Thompson gave Rieves a verbal warning for being out of his work area. Thompson testified he gave Rieves a verbal warning because he had only been working for Respondent for 4 months and had no previous warnings.

Thompson stated he attended the very end of the meeting between Hale, Brown, Bolton, and Job Steward Wilson. Thompson stated he was late because he had spent most of his time giving the verbal warning to Rieves and talking to him about the situation. Thompson testified Brown was suspended until the matter could be investigated further.

Thompson testified he attended another meeting involving the discipline given to Brown. Thompson testified he made no recommendation with respect to what discipline should or would be imposed on Brown. Thompson testified a decision was made to terminate Brown for poor work performance. The decision was made by Prosec, Hale, Skuthern, and Cobern.

Hale corroborated the testimony of Thompson with respect to the events on February 11 and 17, 1982. Hale also testified that he specifically assigned employee Billy Gibson to clean the coal and ice from the tail pulley section and that that was where Gibson had worked on

[10] Wilson defined impact rollers as rubber rollers. Buckets of coal fall onto the conveyor belts, and the impact rollers absorb the impact of the dropping coal.

[11] Pounders allegedly had threatened a leadman and was given a 15-day suspension.

February 11, 1982. Hale stated there was 25 feet of area not cleaned in the portion assigned to Rieves and Brown at the time he picked them up that evening. Hale testified he told Brown, as he took him to Bolton's office, that he had been observed out of his work area and that was why they were going to Bolton's office. Hale stated he told Thompson to give Johnny Rieves a verbal warning unless he had been given one previously. Hale stated he did not talk to Brown when he observed him out of his work area because he thought Brown had been given his fair share of warnings in the past. Hale recommended to General Superintendent Bolton that Brown be given as stiff a penalty as possible so that foremen would not have to continue to put up with employees not listening to or carrying out work orders.

Hale stated on cross-examination that Brown had a number of warnings prior to the strike, but he could not specifically recall the dates. Hale stated that Brown's work was looked at on February 17, 1982, but he did not believe any mention was made of the strike.

Vice President of Operations Prosec testified that he was present at the February 17, 1982, meeting between Respondent and the Union involving the discipline given Brown. Prosec stated that both sides presented their position on Brown and that he, Bolton, and Cobern retired to an office to make a decision with respect to what discipline would be given to Brown. Prosec testified: "We made the decision based on the facts at hand, which included the prior record of Mr. Brown and my first hand knowledge of his extremely poor work performance subsequent to his return to work after November 13; his repeated instances of challenging the company's authority to ask him to do any task in the terminal; indirect insubordinate actions; his refusal to listen to supervisors; his refusal to listen to other union employees who I had asked to counsel him about this behavior—taking all these things into consideration, we elected to terminate Mr. Brown." Prosec testified that the decision made by Bolton, Cobern, and himself was in no way based on Brown's prior strike activities, his union steward duties, or his prior activities as a member of the union's negotiation committee. Prosec stated that after the decision was made and Union Business Manager Ezell had been informed, he (Prosec) asked one of the supervisors to take Brown to his locker to obtain his personal belongings and then escort him from the terminal. Prosec stated that the Union never thereafter attempted to take Brown's discharge to arbitration.

Prosec acknowledged on cross-examination that he reviewed the entire work record of Brown from 1977 forward before making the decision to terminate Brown, but he stated they specifically looked at the period of time after Brown returned to work on November 13, 1981. Prosec testified that Brown, as well as the nine other employees who were brought back after the strike, returned with full seniority rights. Prosec stated further that the employees were absolutely treated as though no probation had been involved in their return to work.

General Superintendent Bolton corroborated the testimony of Prosec as outlined above.

7. Other noteworthy related events pertaining to Brown

Counsel for the General Counsel called Phillip Thompson who testified he had been employed by Respondent as a lab apprentice for approximately a year. Thompson testified that in late December 1981, or early January 1982, he had been present at a conversation between leadperson Thompson and a day-shift operator named McNabb. Employee Thompson stated that leadperson Thompson said that, if it was left up to him, Brown would be fired.

On cross-examination employee Thompson testified he did not know how the subject matter came up with respect to the conversation by leadperson Thompson about employee Brown. Employee Thompson acknowledged on cross-examination that leadperson Thompson had also stated that, if an employee named Dobbs came on his shift, he would fire him also. Employee Thompson also acknowledged that he was present for only 3 or 4 minutes of the conversation between leadperson Thompson and employee McNabb at which employees Brown and Dobbs were discussed, and as such he did not have an opportunity to hear all of the conversation.

Leadman Thompson testified he had a conversation with McNabb at a time when Phillip Thompson was present. Leadperson Thompson placed the conversation in January 1982 and stated it took place at the C-9 conveyor or the C-9 pit area. The conversation came about, according to leadperson Thompson, because of some complaints he had received from different employees who stated that they did not wish to work with Brown because he would not do his part of the work, and they ended up having to do twice as much. McNabb brought up Brown's and Dobbs' names, according to leadperson Thompson. Leadperson Thompson stated that at the time of the conversation Brown was working under his supervision, but employee Dobbs was not. Thompson testified he stated that, if Brown, Dobbs, or any other employee that worked for him did not pull his fair share of the workload, he would not be around long.

The General Counsel presented Harvey Pendergrast as a witness. Pendergrast testified he had worked for Respondent for approximately 2 years and knew employee Brown. Pendergrast testified he had a conversation with leadperson Thompson after the strike in which conversation Thompson stated, "Well, basically he said Brown was a trouble maker and the company was wanting to get rid of him, and when he got to the day shift he was either going to straighten Brown up or have him fired." Pendergrast stated that approximately 2 weeks later he had a second conversation with Thompson "and basically [Thompson] said the same thing again." Pendergrast testified others were present, but he could not recall who.

Pendergrast stated on cross-examination that his conversations with Thompson about Brown came about by the two of them discussing whether someone was a good or bad worker. Pendergrast stated they discussed various employees' job performance including Brown's. Pendergrast acknowledged that Thompson said Brown was not a good worker and that, if he was working for him, he

would get rid of him. Pendergrast also acknowledged on cross-examination that in the second conversation Thompson again stated, after they had talked about the work performance of various employees, that he did not think Brown was a good worker, and, if Brown did not straighten up, he would get fired. Pendergrast stated he and Thompson even argued over whether Thompson had the authority to fire anyone. Pendergrast told Thompson that he could not have Brown fired, that he did not have that authority.

Pendergrast stated on cross-examination he was pretty sure the word troublemaker was used. After examining his pretrial affidavit given on March 24, 1982, and finding that it did not contain any such comments with respect to Brown being a troublemaker, Pendergrast testified in response to questions by Respondents counsel as follows:

> Q. Now, Mr. Pendergrast, would you look through that affidavit and tell me if you find any place in there where you heard Mr. Thompson call Mr. Brown a troublemaker in these two conversations you just related?
>
> A. I didn't say it in this. But usually when we was talking this would be about the same thing as a troublemaker, "a bad one."
>
> Q. A bad worker?
>
> A. Yes.

Leadperson Thompson testified that he had a conversation with Pendergrast in which they argued about his authority with respect to whether he could suspend Brown. Thompson testified he had been having difficulty getting Brown to do his job and that he had stated to Pendergrast that, if Brown did not straighten up, he would not be there much longer. Thompson testified that Pendergrast agreed with him that Brown was a poor worker. Thompson testified that he never at any time told Pendergrast that Brown was a troublemaker. Thompson stated that the conversation took place in either November or December 1981.

William T. Holden was called as a witness by the General Counsel and stated he had been employed by Respondent for approximately 2 years. Holden testified that, in February 1982, he had a conversation with Ron Loveless[12] at Loveless' Grocery on Highway 72, east of Killen, Alabama. Holden testified he asked Loveless if he had heard about Brown's getting fired. Loveless said he had. Holden asked if he had heard about the circumstances regarding Brown's firing, and Loveless responded he had. Holden told Loveless that it was "pretty sorry" for someone to fire a man for doing more than he was asked to do. Holden testified that Loveless responded, "that's the way the company has of getting rid of troublemakers."

On cross-examination, Holden testified that he and Loveless were close neighbors, that he lived just across the road from him. Holden acknowledged that he was one of the employees who had returned to work on probation after the strike because of alleged strike misconduct. Holden testified that the strike misconduct that he engaged in was that he put a lock and chain on the front gate at Respondent's facility in order to lock it shut.

Counsel for the General Counsel presented Kenneth Webb who testified that on September 7, 1981, he followed two supervisors of Respondent in their truck after they left Respondent's facility. Webb testified he followed them on his motorcycle and that in their speeding up and slowing down he had to put his brakes on real fast to keep from hitting the back of their truck. Webb testified they stopped at a quick shop facility to purchase gas. Webb pulled in and stopped also and then attempted to follow them as they left the facility. Webb stated one of the supervisors told him to quit following them. Webb testified that the two supervisors came back to where he was, and one of them hit him on the elbow causing a compound fracture. Webb testified the supervisor later apologized to him. Webb testified that, when he followed the supervisor on his motorcycle from Respondent's premises, he gave the driver and passenger in the truck the finger.

Webb acknowledged on cross-examination that it was possible he may have called the two supervisors "motherfuckers" and "sons-of-a-bitch."[13]

### C. *Credibility Resolutions and Discussion*

After listening to and observing Brown testify, I am fully persuaded that his testimony, where contradicted or uncorroborated, cannot be credited. I found various aspects of Brown's testimony to be unbelievable. I shall highlight and outline some of the testimony of Brown that persuaded me that he did not tell the truth at various points in his testimony. The fact that Brown could testify about various detailed matters in his direct testimony, and then have a selective lack of memory on cross-examination, detracted greatly from the believability of Brown's testimony. Brown, it appeared, testified to events the way he viewed them, or heard what he wanted to hear in conversations rather than what was actually said. For example, Brown testified that Vice President of Operations Prosec had stated in a state court injunction proceeding that one of the employees had told him that Brown had a plan to get inside the plant and cut up conveyor belts. A verbatim transcript of the proceeding indicated that Prosec did not testify in the manner attributed to him by Brown. Likewise, I find totally unbelievable Brown's failure to recall anything about the negotiations between the parties being confidential. I credit Respondent Chief Negotiator Lee's testimony that it was clearly agreed that the negotiations would be confidential. Further, Union Business Manager Ezell's testimony tends to support Lee in that Ezell spoke with Brown after Brown had provided information from the negotiating meetings to the press and told him that he did not think what he had done was in the best interest of negotiations. I do credit, however, Brown's testimony that prior to September 1, 1981, he

[12] The parties stipulated that Ron Loveless was a supervisor for the Respondent within the meaning of Sec. 2(11) of the Act.

[13] Counsel for the General Counsel stated that Webb's testimony was presented for the purpose of showing Respondent's animus toward strikers.

had been warned on more than one occasion about his general work performance by supervisors of Respondent.

I credit the testimony of General Superintendent Bolton, who impressed me as a straightforward, candid, and truthful witness, that he spoke with five of his supervisors, and they informed him that Brown had followed them from the plant on a motorcycle on either September 10, 11, or 12, 1981. I am persuaded that Bolton truthfully testified that each of the five supervisors told him that he had been followed by Brown, for among other reasons, the conduct fits into the pattern of conduct that the strikers appear to have been engaging in. For example, it is undisputed that striking employee Webb followed supervisors on a motorcycle and that striking employee Holden had put a lock and chain around the front entrance gate during the strike. It appears to me the strikers were so concerned about anyone leaving Respondent's facility, that certain of Respondent's supervisory personnel were followed, while it would appear others would have been locked into the facility or at least, the entrance to the facility was locked with lock and chain by a striker. I discredit specifically Brown's denial that he ever followed anyone.

In this same regard I find unbelievable that Brown learned that he was being returned to work on probation from fellow employee Joel Wright. Union Business Manager Ezell testified, and I credit his testimony, that Brown was present at contract negotiations wherein it was discussed that there were a number of employees that Respondent did not wish to return to work because of alleged strike misconduct. Ezell testified that Brown was present with only the possible exception that he may not have been in some particular caucus group where the Union's negotiating committee had gone into smaller groups to decide its position. The evidence indicates that the Union's negotiating committee, of which Brown was a member, was made aware as early as October 28, 1981, of the fact that Brown would be one of those that Respondent did not wish to return to work. It could conceivably be that Brown was not present when the specific deal was agreed to between Respondent and Union that certain of the employees would be returned to work subject to probation, while others would be arbitrated, and possibly even others not taken back at all; however, I am fully persuaded that Brown was aware of the negotiations and knew of the agreement. I am persuaded that Job Steward Willis and Union Business Manager Ezell were present for the Union when the agreement to return Brown, along with others, to work was arrived at. I am persuaded that Ezell, the chief negotiator for the Union, was correct when he testified that Brown was present for the meetings with the exception of possibly not being at a particular caucus meeting.

I credit leadperson Thompson's testimony that he observed Brown on one of Respondent's tugboats in early November 1981 at a time after Brown had returned to work from being on strike. I likewise credit Thompson's testimony that Respondent had a rule against employees being on the tugboat without permission. It is very logical that Respondent had such a rule for the reasons testified to by Thompson that it was easier for Respondent to keep up with its employees and primarily for safety reasons. Thompson credibly testified that Brown did not have on a life jacket and was on the boat without permission. Brown acknowledged he was on the tugboat without permission and he also stated he knew it was a requirement of Respondent that individuals have permission from their supervisor prior to going on a boat. Likewise Brown acknowledged that a restroom facility was available on the shore in the form of a port-a-john some 60 to 70 yards from the boat.

I credit leadperson Thompson's testimony that he specifically gave Brown a verbal warning on or about January 18, 1982, for being away from his assigned work area. Brown first could not recall any warnings he had received between the one involving the tugboat and the warning he received on January 26, 1982; however, after questioning by Respondent's attorney, Brown recalled leadperson Thompson saying something to him about why he had not been watching the belts in the tunnel instead of standing by a heater some distance away from the tunnels. I am persuaded that Thompson gave Brown a warning on or about that date. It is undisputed that on the day in question Brown had been instructed to keep a close watch on the feeder belts and to walk the tunnels; however, when Thompson found Brown, he was not walking the tunnels but was away from them warming himself by a heater. I am further persuaded that Thompson's testimony was correct and accurate about having to closely watch the belts because even Brown acknowledged that a constant watch over the belts was necessary inasmuch as damage could result if they were not constantly monitored. Although Brown at first could not recall any such discipline, he later, during redirect examination by counsel for the General Counsel, placed the date of the incident as January 18, 1982.

I find unbelievable Brown's testimony that Thompson told him his time was limited. Thompson could not recall any such conversation. I am persuaded that what Thompson did say, as is brought out elsewhere in this Decision, was that Brown was not a good worker and if Brown or anyone else did not pull his fair share of the workload, he would not be around long. I am persuaded that any such comments made by Thompson were made in that context rather than as testified to by Brown that he just told Brown out of the clear blue that his time was limited. I find Brown's testimony in this respect unbelievable. Brown could not state how the conversation arose or what was being discussed, if anything, at the time.

I credit leadperson Thompson's testimony that he observed Brown on January 26, 1982, in the loadout area for a period of time before he (Brown) went to his assigned task of walking the tunnels and checking the tunnel belts. Brown did not deny the fact but simply could not recall whether he had been in the loadout that morning before walking the tunnels or not. I likewise credit Thompson's testimony that he got involved doing something else and did not have a chance to check on Brown for a while but later did check on him and could not locate him. I credit Thompson's testimony that Brown had not been in tunnel C-8 that morning for an extended period of time, maybe even over an hour, and

that it was essential to the operation that Brown walk the tunnel in order to observe the belts. I likewise credit Thompson's testimony that, when he did find Brown in tunnel C-6, he did not see Brown have a feeder wrench at that time. It is very probable that Thompson could not talk to Brown in the tunnel because of the conveyor belt noise and took him outside the tunnel to his vehicle before he informed him of what was happening. Brown admitted he was in the loadout area at some point that morning for possibly as much as 10 minutes but testified he was there for the purpose of reporting water coming off of one of the feeder belts. Brown denied he was told not to be in the loadout area but stated he was only informed not to be in there for an extended period of time. Brown did not explain how it took him 10 minutes to report water coming off of a feeder belt. I credit Thompson's testimony that Brown called him a liar and that as a result he told Brown to get his stuff and "get the hell out of there." Brown was very equivocal in his denial with respect to calling Thompson a liar; Brown would state only that he did not remember precisely calling Thompson a liar. Such an equivocal answer on the part of Brown coupled with the other factors relating to his credibility, as outlined above and alluded to below, persuades me that Brown did in fact call Thompson a liar. I am persuaded that the evidence supports Thompson's statement, and as such I credit it, his suspension of Brown was in no way related to or based on Brown's conduct during the strike or his performance as a job steward or because of his position on the Union's negotiating commitee but rather was because Brown did not perform his assigned tasks on January 26, 1982. The disciplinary letter sent to Brown on February 29, 1982, by General Superintendent Bolton tends to support the testimony of Thompson with regard to the discipline given to Brown on January 26, 1982.

I credit Thompson's testimony, which was corroborated in all essential parts by Hale, that he gave specific instructions to Brown and Rieves on February 11, 1982, as to where they were to work and what they were to do on conveyor belt C-1. I discredit Brown's testimony that he was not given any work instructions with respect to not working in a particular area.[14] I credit Thompson and Hale's testimony that Brown was working outside of the area that he was to have been performing work in at a time when there was at least 25 feet of area that needed to be cleaned in the area that Brown and Rieves had specifically been assigned to. I do so, for among other reasons, Brown admitted that he had been working below the impact rollers on the tail pulley section on the day in question. I find unpersuasive Brown's testimony that, although he was told to chip away the frozen coal from the area of the incline on the C-1 conveyor belt, he did not recall being told not to chip in the tail pulley section. I find Brown was given specific instructions as to where he was to work.

I credit Thompson's testimony that he made no recommendation with respect to what discipline Brown might receive as a result of his being out of his assigned work area on February 11, 1982. I also credit Thompson's testimony that, when he observed Brown out of his assigned work area, he did not speak to him for the reason that he did not feel he needed to continually talk to Brown about his not following instructions. The evidence tends to support Thompson's testimony in that respect.

I also credit Thompson's uncontradicted testimony that Rieves had only been working for Respondent for approximately 4 months and had no prior warnings and that as a result he only gave him a verbal warning for being out of his work area as opposed to any further discipline.

The record evidence as a whole supports, and I credit, Prosec's testimony that the discipline taken against Brown, that is his discharge on February 17, 1982, was in no way related to his strike activities, job steward activities, or his negotiating committee meeting activities. In this respect, I note Brown acknowledged that no mention was made at the meetings with Respondent about his discipline by either himself or Union Business Manager Ezell that his suspension on Feburary 11 and subsequent discharge on February 17 were in any way related to his strike, negotiating, or job steward activities.

With respect to the conversation that employee Phillip Thompson overheard between leadperson Thompson and employee McNabb, I credit leadperson Thompson's version of that conversation. I do so because Phillip Thompson acknowledged that he only heard part of the conversation (maybe 3 or 4 minutes) and was not aware of all that may have been said. Leadman Thompson's testimony was very logical and believable in that he testified the conversation came about as a result of complaints to him from different employees that they did not wish to work with Brown because Brown would not carry his part of the job. Leadperson Thompson stated that McNabb brought up two employees by name, Brown and Dobbs. I credit Thompson's testimony that he told McNabb that, if Brown or Dobbs or any other employee did not pull his fair share of the load, he would not be around very long.

I credit leadperson Thompson's testimony over that of employee Pendergrast for a number of reasons. Pendergrast seemed rather uncertain as to what was really said in the conversation or conversations he attributed to Thompson. Pendergrast testified as to "basically" what Thompson had said, and in reference to the second conversation he stated that Thompson had basically said the same thing again. I am persuaded that, when Thompson spoke with Pendergrast about Brown, he never used the word troublemaker. Pendergrast acknowledged on cross-examination that he equated being a bad worker with being a troublemaker; therefore, I do not believe that the word troublemaker was ever used. Pendergrast never referred to the word troublemaker in his pretrial affidavit given to the Board. I am persuaded that it was either an afterthought on the part of Pendergrast or a belief that the words, poor worker and troublemaker, were one and the same and that he could use them interchangeably even though the word troublemaker was not used in the original conversation or conversations.

[14] I credit Hale's testimony that he specifically assigned employee Gibson to work the tail pulley section.

I credit the uncontradicted testimony of Holden with respect to the conversation he had with Supervisor Loveless in February 1982.

### D. *The Contentions of the Parties*

Counsel for the General Counsel contends that Brown's ultimate termination on February 17, 1982, must be viewed in light of a series of events connected to his union activities and strike participation. Counsel for the General Counsel contends that Brown's position as a job steward along with his acting as a committee member for the Union's negotiating committee and his conduct during and activity related to the strike caused Respondent to desire to rid itself of him. Counsel for the General Counsel contends that the fact Brown was specifically named in the temporary injunction sought in state court demonstrated the animosity Respondent had toward Brown. Counsel for the General Counsel contends that Respondent was also determined to rid itself of Brown because he reported to the news media the actions of the parties during their negotiations. Although at the hearing and in brief counsel for the General Counsel never contented the termination of Brown in November 1981 and his subsequent reemployment violated the Act in any manner, he did contend that the fact that Brown was returned to work along, with various other employees, on probation caused all disciplinary action against Brown thereafter to be tainted by the fact that he was returned on probation. Counsel for the General Counsel contends that Brown committed no misconduct during the strike, but that, if he did, it was not of sufficient nature to take away from him the Act's protection to engage in strike activity. Counsel for the General Counsel contends that the strike settlement agreement must be viewed as a prearbitration agreement, and, as such, the General Counsel contends that it did not meet the requirements of such an agreement in that the parties involved had to agree to be bound by the agreement and the legality of the discharge or discharges must have been considered in the agreement. The General Counsel contends, "The placement of Brown in probationary status, and all discipline flowing from it, must be treated as fruit from a poisonous tree, and, therefore, illegal."

Counsel for the General Counsel contends that all discipline given to Brown for infractions after he returned to work was given to him by a supervisor that had told him his time was limited and that he was out to get him. The General Counsel contends that Brown "was placed under the supervision of leadman Larry Thompson, the same supervisor who implicated him in a conspiracy to sabotage the plant, accused him of strike misconduct, and had always made clear his intention to seek ways to get rid of Brown." Counsel for the General Counsel contends that the discipline given Brown was really pretextual and came about as a result of Respondent's effort to rid itself of an individual that had caused it great difficulty.

Counsel for the General Counsel contends that the alleged verbal warning given to Brown on January 18, 1982, marked the beginning of a new sequence of events, stemming from the strike, which led to Brown's ultimate termination. Counsel for the General Counsel contends that Respondent has given contradictory reasons for the discipline given Brown on January 26, 1982. He contends that the letter issued to Brown indicated he had been suspended for being in the loadout area for 20 minutes. Counsel for the General Counsel contends that leadperson Thompson's testimony indicated Brown was disciplined for being away from a particular tunnel he was assigned to be walking in. The General Counsel contends the two reasons are contradictory and indicate the pretextual nature of the discipline given.

The General Counsel contends that Brown was never given specific instructions on February 11, 1982, with respect to what area he was to work in, and that fellow employee Rieves was treated differently from Brown. The General Counsel contends the Respondent relied on Brown's prior work history and ignored the 1-year limitation placed on such inspection by the contract between the parties. The General Counsel contends Respondent was able to do this because of Brown's probationary status which he contends never could have been legally imposed on Brown.

The General Counsel also contends that Respondent's general animus toward strikers was demonstrated by the fact that employee Webb was injured in a strike-related matter, and that Respondent's animus toward Brown in particular was demonstrated by the comment of Supervisor Lovelace to employee Holden that Respondent had a way of getting rid of troublemakers.

The General Counsel contends, although he seeks no violation with respect thereto, that Brown's initial termination was unjustified, that Brown could not have been barred from filing a charge, and that he was not a party to the strike settlement agreement. The General Counsel contends the uncontradicted statement attributed to Lovelace by Holden demonstrates that discipline was disparately applied to Brown. Counsel for the General Counsel also contends that the probationary status of Brown constitutes an important element in whether a violation occurred in this case. Counsel for the General Counsel contends Respondent was looking for the slightest reason or pretext to rid itself of Brown.

Respondent takes the position that all the discipline imposed on Brown came about as a result of Brown's job performance and would have been given even in the absence of any union or concerted activity on the part of Brown. Counsel for Respondent contends that Brown's statutory rights were in no way abrogated by Respondent and the Union negotiating, in good faith, a strike settlement agreement even though the agreement called for the reinstatement of some strikers on a probationary basis for a limited period following reinstatement. Respondent contends that Brown was present when the strike settlement agreement was discussed and that he returned to work subject to it with no evidence that he protested the agreement by filing any grievance or unfair labor practice charge after the agreement was executed.

Respondent contends that Brown's repeated failure to follow his supervisor's work instructions following his return to work, coupled with his marginal work record, resulted in his suspensions and terminations, and that neither Brown's union activities, job steward or negotiating

positions, nor his strike conduct played any part in his discharge.

Respondent contends that it has clearly shown, even assuming *arguendo*, that a *prima facie* violation had been established, that Respondent would have imposed the same discipline upon Brown in the absence of any union activities by Brown. Respondent contends the evidence is undisputed that Brown was the only employee among the 10 strikers returned who has been terminated since the strike settlement agreement. Respondent contends it essentially followed its progressive disciplinary procedure and contends that Brown had repeatedly and progressively been disciplined prior to the final termination imposed upon him.

Counsel for Respondent contends it is unreasonable to assume Respondent, after settling the strike and the contract, would recriminate against Brown for the innocuous incident of reporting to the news media the status of negotiations. Respondent contends that it has produced substantial and persuasive evidence that Brown's work performance motivated Respondent's decisions to suspend and subsequently terminate him. Respondent points out that Brown challenged Respondent's rule prohibiting an employee from being on a tugboat, that on January 18 he was out of his assigned work area and not performing his task of walking the tunnels, that on January 26 he had disappeared for over an hour when he should have been checking conveyor belts in tunnels C-6 and C-8, and that on February 11, he did not perform work he had been assigned but rather took upon himself to select an area that he wished to work in. Respondent contends it has adequately demonstrated that Brown had reached an unresponsive stage with respect to following his supervisor's instructions, and that he had come to the point where he wished to determine where, when, and in what manner he would perform his work. Respondent contends it was justified in its decision to suspend and terminate Brown after Brown had indicated by his actions that he did not intend to affirmatively respond to progressive discipline.

### E. *Analysis and Conclusion*

Brown was a job steward at Respondent for the Union for a period of time during which he filed various grievances for fellow employees. Brown served on the Union's negotiating committee during the most recent contract negotiations. Brown was initially discharged for alleged strike misconduct; however, he was returned to work by a negotiated agreement between the Union and Respondent. Brown returned to work, as did certain others, in a probationary status. Brown was disciplined several times after his return to work and was discharged within approximately 3 months of his return. It was stated by a supervisor of Respondent with respect to Brown's termination that that was the way Respondent had of getting rid of troublemakers. I am persuaded, based on the facts as outlined above, that counsel for the General Counsel has established an arguable *prima facie* case sufficient to support an inference that protected conduct was a motivating factor in Respondent's disciplinary actions against Brown. See *Wright Line*, 241 NLRB 1083 (1980). I am also persuaded that Respondent met its *Wright Line* burden of demonstrating that the same action it took against Brown would have taken place even in the absence of the protected conduct.

To understand the discipline given Brown on January 26 and February 11 and 17, 1982, it is necessary to look at Brown's conduct and work performance after his return to work at the conclusion of the strike.[15] Brown, along with all other employees of Respondent who had been on strike, returned to work on November 13, 1981. Within just a few days of his return to work, Brown went on board one of Respondent's tugboats on the Tennessee River without permission. Brown knew he needed permission to be on the tugboat and acknowledged he did not have such permission. Respondent had valid safety concerns about employees being on the tugboats as well as a desire to readily know where its employees were at all times. Brown acknowledged that restroom facilities were available in an area where he was permitted to go. Although it is not before me as a violation, it is necessary to give consideration to the tugboat incident in light of the progressive disciplinary procedures utilized by Respondent. I am persuaded that the verbal warning given to Brown because he had gone on the tugboat to use the boat's restroom facility was given for valid reasons and was not merely a pretext somehow related to an illegal desire of Respondent to rid itself of Brown. It is well settled that the mere fact an employee is or has been a strong union advocate cannot serve to insulate that employee from discipline for violating lawful work rules. See *Tennessee Plastics*, 203 NLRB 1 (1973), enfd. 488 F.2d 535 (6th Cir. 1973).

The credible testimony failed to support the General Counsel's contention that at or about this time frame (early 1982) Thompson told Brown that his time was limited. The only credible testimony in this respect was that Thompson had indicated that, if Brown or any other employee did not pull his his fair share of the work load, he would be fired. I find no unlawful motive in Thompson's comments in this respect. I also find nothing in the tugboat incident that would indicate Respondent was out to get Brown.

It is clear that Brown, when confronted by leadperson Thompson, was not walking tunnels as he had been instructed to do on January 18, 1982, but was, rather, 50 to 75 yards away warming himself by a heater. Brown acknowledged that the conveyor belts in the tunnels required constant watch because, if there was an uncorrected malfunction, that part of the operation could be shut down, and the conveyor belt ruined. I do not find anything in the verbal warning given to Brown by Thompson that would indicate it was given for any unlawfully motivated reasons, but was, rather, a correction given to an employee for not being where he was supposed to be, and for not performing his assigned job duties. Although it was one of the duties of a tunnel walker to pump water from the tunnel when necessary, there is nothing in this record that would indicate it could be done by observing the pump at a distance of 50

[15] Brown acknowledged that prior to September 1, 1981 (the date the strike began), he had been warned more than once by supervisors of Respondent about his general work performance.

to 75 yards. Brown's testimony that he had pumped water from tunnels in the past without any warnings is unpersuasive in that there is no showing that he observed the pumping operation in the past from such a distance as he had done in the particular incident in question.

It is clear from the credible record evidence that Brown was not performing the tasks he was assigned to perform on January 26, 1982. It is without question that Brown was in the loadout cab on the date in question. Brown offered no explanation as to why it would take him, even by his own estimate, 10 minutes to tell the loadout operator that water was coming off one of the conveyor belts in one of the tunnels he was supposed to have been watching. I am convinced that Brown had not been in one of the tunnels he had been assigned to observe for approximately 1 hour when leadperson Thompson confronted him on the date in question.

Upon informing Brown that he had been suspended, Brown at that point became belligerent and called Thompson a liar, and it was only at this point that Thompson told Brown to get his stuff and "get the hell out." I find nothing in the prior discipline given Brown, or in the suspension given him from January 26 to February 3, 1982, to indicate it was done for any unlawfully motivated reason. I do not view Thompson's testimony and Respondent's letter of January 29, 1982, to present contradictory reasons for disciplining Brown on January 26, 1982.[16]

With respect to the February 11, 1982, suspension and subsequent discharge of Brown, it is quite clear that Brown was twice given specific instructions on February 11 with respect to where he was to work. Brown chose to ignore those instructions for whatever reasons. Brown admitted cleaning away coal and ice in the tail pulley section. This was an area where another employee had been assigned to perform work, not Brown. The coal, ice, and frozen debris may have needed to be removed from that area, but Respondent had the right to select what employee or employees it desired to clean that area and to decide how it would assign its work force without violating the Act so long as the selections were not for discriminatory reasons. There is no showing on this record that the selection of job assignments on that day was for any discriminatory reasons.

I am unpersuaded that there was disparate treatment of Brown by the fact that fellow employee Rieves was given a verbal warning for being out of his assigned work area whereas Brown was discharged. It is undisputed on this record that Rieves was a relatively new employee of Respondent and had no previous warnings. Brown had many prior warnings. I do not find any unlawful conduct, within the meaning of the Act, with respect to the fact that neither Thompson nor Hale attempted to correct Brown on February 11 with respect to his being out of his assigned area. The reasons advanced by Thompson and Hale that Brown had been warned time and time again were persuasive. It is also undisputed on this record that work still needed to be performed in the area that had been assigned to Brown on the date in question. The record evidence fully supports the testimony by various of Respondent's witnesses who testified that Brown's prior union activities, shop steward functions, and his role as a member of the Union's negotiating committee had nothing to do with Brown's suspensions and discharge.

I am unpersuaded that animus toward Brown was established by the fact that he was named by Respondent in the state court injunction it sought and obtained. There were various other individuals named in the temporary injunction who were returned to work and who have not, based on this record, been unlawfully disciplined.

I find totally unpersuasive the contention that Respondent would somehow harbor animus against Brown because he informed the news media about contract negotiations; particularly in light of the fact that the matter was only mentioned once in negotiations, and a contract was thereafter arrived at and executed by the parties.

I reject the General Counsel's contention that the comment made by Supervisor Loveless to employee Holden about Brown's discharge demonstrated Brown was treated in a disparate manner. Loveless had no involvement in the decision to discipline Brown. I am convinced that troublemaker, as generally mentioned in this case, meant a worker who would not follow instructions or abide by orders of his supervisor. The Board has at times noted the word "troublemaker" to be a familiar euphemism for a union supporter, see, e.g. *Huntington Hospital*, 218 NLRB 51 (1975), and *ASC Industries*, 217 NLRB 323 at fn. 7 (1975); however, it does not suggest that the word cannot be used in certain situations or contexts without the negative connotation counsel for the General Counsel urges in the instant case. The overall record evidence suggests that the negative connotation should not be applied in the instant case, and I do not attribute any unlawful connotation to the comment in question.

I, likewise, do not view the incident involving former employee Webb and certain of Respondent's supervisors, as outlined elsewhere in this Decision, to constitute general animus on the part of Respondent toward all strikers to the extent that it would attempt to later discharge or discipline them after they had been returned to work. This record indicates Brown was the only employee alleged to have engaged in strike misconduct that was disciplined in the manner he was after having been returned to work following the strike.

Finally, I feel it is necessary to address counsel for the General Counsel's contention that the settlement agreement that returned certain of the strikers, who had allegedly engaged in strike misconduct, to work somehow tainted all subsequent discipline given to Brown. First it is obvious from the facts outlined above and the allegations made in the complaint that the initial discharge of Brown and his subsequent return to work on probation are not before me. The evidence indicates that Brown engaged in the misconduct that Respondent contends he engaged in during the strike. However, under current Board law, the misconduct would not have been suffi-

[16] The January 29, 1982, letter, which Brown acknowledged receiving, indicated that any further acts of inefficiency on his part or any failure on his part to comply with orders of his supervisors or any failure to stay in his assigned area could lead to his termination.

cient to deny Brown reinstatement if an unfair labor practice complaint had issued and the facts were as set forth in this record. No charge was ever filed with respect to Brown's initial discharge and subsequent reinstatement with probation, although such a charge could have been timely filed at the time Brown filed the underlying charge in this case. Counsel for the General Counsel, at the hearing, specifically stated he was not seeking any finding as to any unfair labor practice with respect to Brown's initial discharge and subsequent reinstatement. I reject the General Counsel's contention that the agreement between Respondent and Union to return various employees to work on probation, and/or by way of arbitration, somehow forever thereafter unlawfully tainted any discipline taken against Brown. The agreement was nothing more than an understanding between Respondent and the Union that, rather than have some 20 employees discharged, the parties agreed that 10 would be reinstated with probation, a number of the remaining 10 would have their reemployment decided by arbitration, and, if reinstated, they would be reinstated with probation, while possibly others would not be returned at all. Board law only states that employees may not be denied reinstatement if the offenses they have committed during the conduct of a strike are of a certain category, not that some lesser discipline may not be taken against them. The issues surrounding Brown's initial discharge and subsequent return to work with probation at the conclusion of the strike are not before me as an unfair labor practice. Therefore, the agreement may not, as contended by the General Counsel, be viewed as a prearbitral agreement that deferral should not be given to such as is envisioned in *Roadway Express*, 246 NLRB 174 (1979). There is nothing to deny deferral to inasmuch as the matters over which I am requested to deny deferral to are not before me. The Charging Party could have filed an unfair labor practice charge regarding his initial discharge and subsequent probationary status, but he did not. There is no evidence on this record that Brown was in any way precluded or inhibited by the agreement from filing any unfair labor practice charge if he had opted to do so. Brown, by his position on the negotiating committee, knew of the agreement even though he may not have sat on the specific union caucus that approved the final agreement. He returned to work subject to the agreement and never attempted to have his Union complain that he was being treated unfairly by the terms of the agreement, nor did he ever file an unfair labor practice charge with respect thereto, even though he could have at the time he filed the underlying charges herein. I, therefore, conclude that nothing in the agreement between Respondent and the Union with respect to the return of Brown and others to work subject to the terms of the agreement unlawfully tainted any further discipline with respect to Brown, nor did it preclude Respondent from reviewing Brown's entire work record at the time it decided to discharge him on February 17, 1982, inasmuch as Brown was a probationary employee. I am persuaded that Respondent could, and did, lawfully look to Brown's entire record when it discharged him on February 17, 1982. I am fully persuaded that Respondent has demonstrated that the same action would have been taken against Brown even in the absence of any protected conduct on his part.

In summary, after careful consideration of each of counsel for the General Counsel's contentions (including those not expressly mentioned herein), I have concluded that Respondent has not violated the Act in any manner as alleged in the complaint. I, therefore, recommend dismissal of the complaint allegations in their entirety.

## CONCLUSIONS OF LAW

1. Orba Transshipment of Alabama, A Division of Orba Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 320, is a labor organization within the meaning of Section 2 (5) of the Act.

3. Respondent did not violate Section 8(a)(3) and (1) of the Act when it issued a 7-day disciplinary suspension on January 26, 1982, to its employee Randall D. Brown, nor did it violate Section 8(a)(3) and (1) of the Act when, on February 11, it indefinitely suspended Brown, and on Feburary 17, 1982, discharged and thereafter failed and refused to reinstate Brown.

4. Respondent has engaged in no unfair labor practices violative of the Act.

Upon the basis of the foregoing findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

## ORDER[17]

It is hereby ordered that the complaint in Case 10–CA–17928 be, and it hereby is, dimissed in its entirety.

[17] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.